Filed 3/15/16 P. v. Lopez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO LOPEZ, Defendant and Appellant.	E062323 (Super.Ct.No. RIF1209170) OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge. Affirmed with directions.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

After defendant Alejandro Lopez killed his girlfriend, her remains were found months later, buried in a shallow grave. A jury convicted defendant of first degree murder (Pen. Code, § 187)[1] and found that defendant had personally discharged a firearm, causing injury or death. (§ 12022.7.) The court imposed a total prison term of 57 years four months to life.

On appeal, defendant contends there was insufficient evidence of the proximate cause element of the firearm use enhancement and of premeditation and deliberation. However, according to the evidence, defendant shot the victim in the head, constituting substantial evidence that the shooting proximately caused the victim's injury or death. Also, the manner of the killing—a shooting and a vicious beating that cracked the victim's skull and broke her jaw in half—as well as evidence of defendant's motive and prior relationship with the victim, substantially supported the jury's finding of premeditation and deliberation.

Defendant also argues there was instructional error regarding the firearm use enhancement, propensity evidence, and consciousness of guilt. These claims were forfeited by defendant's failure to object below and have been rejected by California courts. Defendant's remaining claims of ineffective assistance of counsel and other errors also fail. The evidence of the victim's statement was properly excluded as hearsay

[1] All statutory references are to the Penal Code unless stated otherwise.

and its exclusion did not deprive defendant of his constitutional right to present a defense. The prosecutor's reference to defendant as a "beast" was not misconduct based on the state of the evidence. We affirm the judgment with a modification granting defendant one additional day of custody credit.

II

STATEMENT OF FACTS

A. The Disappearance of Elliott in October 2012

Karly Elliott and her boyfriend, Lorne Krueger, lived together in a house on Norwood in Riverside. In September 2012, after they broke up, she moved out and began staying with defendant, whom she had met through Krueger. Elliott then contacted Krueger and told him that something "out of the ordinary" was happening. On October 25, Elliot called Krueger and asked to talk with him "about her situation." When they met that evening, Krueger observed Elliott was not acting like herself but "standoffish . . . like she was holding back."

Krueger thought that Elliott was going to leave defendant and move back in with him. The two planned to meet at the Norwood house the next day but Elliott never showed up and she did not respond when Krueger texted her. Krueger never saw Elliott alive again.

B. The October 27, 2012 Fire

Because Elliott's mother, Kari[2] was worried, on Saturday, October 27, 2012, Kari

[2] We use her first name for ease of reference.

and Krueger went to defendant's house to look for her. On the same day, the Riverside County Fire Department had responded to a call at 6315 Frank Avenue in Mira Loma, regarding a hazardous material spill. When firefighters arrived at the scene, there were two camper trailers in the front yard and a big pool of petroleum oil on the street. Smoke was billowing up from the backyard, where a fire was burning. When firefighters entered the backyard, they saw it was filled with several hundred potted marijuana plants. A barrel contained burned debris and electrical wires. The grass around the barrel was scorched and the fire had moved into the neighbor's yard. Firefighters found two canisters of lighter fluid with footprints around them. Investigators determined the fire had been intentionally set.

When police responded to the scene, they heard loud music coming from the open door of the camper trailer in front of the house. Defendant was sleeping inside but he awoke and became confrontational, yelling "get the fuck off [my] property." Defendant tried to fight the police as they handcuffed and detained him. When an officer performed a safety sweep of the home, he found a 1911 Kimber pistol and a STEN machine gun. Inside the house, there was blood in the hallway, blood in the bathtub, and a pool of blood on the floor. The living room had been converted into a marijuana grow operation.

Kari arrived at the scene, crying and frantic. She told police that her daughter was missing and she had last seen her on October 23 when she looked like she had been beaten up. Kari pointed at defendant, seated in the back of a patrol car, and blamed him for Elliott's disappearance.

C. The Police Investigation

The investigators obtained search warrants for defendant's house and Elliott and defendant's cell phone records. Upon a further search of the residence, police observed a large amount of blood on the kitchen floor, blood spatter on the walls next to the kitchen, a trail of blood from the tile floor into the bathroom, and more blood inside the bathroom and shower. Police also found three bullet shell casings.

In October, defendant had exchanged text messages and phone calls with Elliott. On the morning of October 26, Elliott sent defendant a text message that read, "'Every morning I feel sick. It's like groundhog's day. I'm getting a pregnancy test. Hopefully it is negative. I will let you know what happens.'" Defendant returned the call and that was the last day Elliott's phone displayed any activity.

Investigators interviewed two of defendant's neighbors: Rosa Trujillo and Rigo Serna. A week before the October 27 fire, Trujillo was watching television late at night when she witnessed defendant and Elliott arguing. Defendant tried to pull Elliott out of the car. Elliott screamed to be left alone and defendant screamed back, "No, fucking bitch, no." Elliott sounded desperate and the fighting escalated when defendant pulled out a gun and held it to her head. Trujillo was scared but she did not call 911 because she did not want to get involved.

Serna remembered seeing Elliott at defendant's house many times in the months before October 27. Defendant told Serna that he had asked Elliott to move out. The day before police were called to defendant's house, Serna saw defendant and the victim leaving the house together. Victim's red PT Cruiser was parked on Serna's property.

When Serna called defendant but received no answer, he walked over to defendant's property and defendant appeared with Elliott and holding a rifle or machine gun. Defendant pointed the gun at Serna but then he laughed and set it down on the driveway. When Elliott walked past, defendant picked up the gun again and said, "I've got to get this away from this bitch." Defendant and Elliott then went into the backyard. That was the last time Serna saw Elliott.

Later that evening, defendant parked his truck at Serna's house. At this point, Elliott's PT Cruiser was still parked outside. Defendant left his truck in his underwear and barefoot. Defendant went into his house and came back out wearing pants. He asked Serna to help him move the PT Cruiser. Serna helped defendant push the car onto a trailer hitched to defendant's truck. When Serna asked defendant about Elliott, defendant said, "She is fucking gone. . . . She is like fucking dead. . . . She is in the kitchen." Serna was shocked and in disbelief. Defendant asked Serna to help him with the kitchen and Serna refused. Serna did not initially tell police what happened because he was afraid of defendant who had been violent towards him in the past.

The police found the PT Cruiser in a residential area of Mira Loma. The outside of the car had severe damage to the rear passenger side. Inside the car was a grocery store receipt dated October 26, showing a purchase at 12:45 p.m. of liquor, water, food, and a pregnancy test. Elliott's date of birth, January 23, 1980, was listed on the store receipt for the purchase of alcohol. A surveillance video from the grocery store showed a man and a woman in a red PT cruiser pull into the store parking lot, enter, make a purchase, and exit.

When police interviewed defendant, he claimed Elliott was not his girlfriend and that he did not know her. When shown her photograph and asked whether he had seen her, defendant responded, "Oh God no," in a disgusted tone.

D. The Discovery of the Victim's Remains

Some travelers discovered a skull and jaw bone near Gilman Springs Road in Moreno Valley. At the scene, investigators found several bones near a ravine and drainage area north of Gilman Springs Road. The remains were covered with palm tree branches. Investigators recovered several bone fragments, including a partial lower jaw, a partial skull, collar bone, shoulder blade, four ribs, a partial femur, and a foot that was inside a jeans pant leg. Because animals had scattered the bones, many were still missing and a complete skeleton could not be recovered. Investigators also found several pieces of clothing, including four socks and a pair of tan pants.

E. Forensic Findings

Several strands of hair collected from the gravesite for forensic testing exhibited a DNA sequence matching defendant's. DNA testing of blood on the Kimber pistol and in defendant's house and of the femur bone established a match for the victim.

A crime scene specialist testified that blood spatter occurs as the result of force impacting a blood source. The specialist explained that, based on the presence of back spatter (or small blood droplets) inside the barrel of the Kimber, the gun barrel was in contact with, or close proximity to, the victim's bullet wound.

A forensic ondontologist compared an x-ray of the partial lower right and left jaw, recovered at the grave site, and the victim's orthodontic retainer and dental x-rays from

July 2000, and concluded that they were a "one hundred percent positive" match. An anthropologist with the coroner's office examined the remains and determined a full skeleton had not been recovered. The mandible—a portion of the jaw bone that is "very very strong"—was fractured as a result of a direct blunt force impact. A forensic pathologist examined other remains to determine a cause of death. The pathologist observed significant trauma to the skull, which had multiple fractures. Based on the skull fractures and the broken mandible, the pathologist concluded that one cause of death was homicide caused by violence or blunt force trauma to the skull and jaw. It could not be ascertained whether the victim had been shot in the chest or stomach, or whether she was pregnant at the time of her death.

III

THE FIREARM USE ENHANCEMENT

Defendant contends insufficient evidence supports the true finding of the firearm use enhancement, arguing the evidence "failed to establish that Karly suffered great bodily injury or was killed as the result of the discharge of a firearm." We disagree because we conclude substantial evidence supported the jury's finding that defendant's discharge of the firearm proximately caused the victim great bodily harm or death.

We "review[] the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Davis* (2009) 46 Cal.4th 539, 606; *People v. Holt* (1997) 15 Cal.4th 619, 667.) We do not reweigh the evidence or revisit credibility issues. We defer to the

judgment of the trier of fact and presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The standard is the same for circumstantial evidence. (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 879.) Reversal of the judgment is not warranted simply because the circumstances might reasonably be reconciled with a contrary finding. (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639.)

Section 12022.53, subdivision (d), requires imposition of an additional 25 years to life term, for any person who, in the commission of a specified offense, "personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death[.]" (§ 12022.53, subd. (d).) Section 12022.7, subdivision (f), defines great bodily injury as "significant or substantial physical injury."

The California Supreme Court broadly defines "proximate cause" as used in section 12022.53. In *People v. Bland* (2002) 28 Cal.4th 313, 318, either the defendant or his accomplice shot into a car and killed one person and injured two others. The defendant was convicted of first degree murder and premeditated attempted murder. As to all three convictions, a jury found true the allegation that the defendant personally discharged a firearm and proximately caused great bodily injury or death. (*Ibid.*) In holding that the trial court had a sua sponte duty to instruct on the definition of proximate cause, the Supreme Court approved a previous instruction that defined the term as follows: "'A proximate cause of great bodily injury or death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the

great bodily injury or death would not have occurred.'" (*Id.* at p. 335.) The court further noted that section 12022.53 is satisfied even if the bullet did not actually strike the victim, so long as the defendant's discharge of the firearm was a substantial factor that contributed to the victim's great bodily injury or death. (*Id.* at pp. 337-338.)

Here defendant's shooting proximately caused great bodily injury or death. Investigators found three bullet shell casings and two expended bullets in defendant's house. A forensic expert concluded that the Kimber gun was fired while in contact with or very close to the victim's body. The crime scene was awash in blood and blood spatter. Drawing all reasonable inferences, substantial evidence supports the jury's finding that defendant shot Elliott at close range, necessarily causing great bodily injury or death.

Defendant argues the expert testified that the cause of death was blunt force trauma, not a bullet wound. But the prosecution was not required to prove that a gunshot was the sole cause of injury. (*People v. Bland, supra*, 28 Cal.4th at p. 338.) The evidence showed three shots were fired inside defendant's house. Certainly, the jury could have concluded that defendant shot the victim, as well as beating her. The jury could reasonably infer from this evidence that defendant discharged a firearm, proximately causing either great bodily injury or death to the victim, even if there were additional causes of death or harm. The jury's true finding of the firearm use enhancement was thus supported by substantial evidence.

IV

CALCRIM No. 3149

Defendant next argues that CALCRIM No. 3149 was "constitutionally flawed because it misstates the essential element of proximate causation between the discharge of the firearm and the great bodily injury or death to the victim." Specifically, he misinterprets the instruction and contends that it fails to specify that the defendant's discharge of the firearm, as opposed to some other act, had to be the proximate cause of the victim's great bodily injury or death. This claim was forfeited by not raising it below. (*People v. Hart* (1999) 20 Cal.4th 546, 622.) Notwithstanding, CALCRIM No. 3149 is a correct statement of the law.

Based on CALCRIM No. 3149, the trial court instructed the jury as follows:

"If you find the defendant guilty of the crimes charged in Count 1, you must then decide whether the People have proved the additional allegation that the defendant personally and intentionally discharged a firearm during that crime causing (great bodily injury/or death).

"To prove this allegation, the People must prove that:

"1. The defendant personally discharged a firearm during the commission of that crime;

"2. The defendant intended to discharge the firearm; [¶] AND

"3. The defendant's act caused (great bodily injury to/or the death of) a person. [¶] . . . [¶]

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"An act causes (great bodily injury/or death) if the (injury/or death) is the direct, natural, and probable consequence of the act and the (injury/or death) would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

"There may be more than one cause of (great bodily injury/or death). An act causes (injury/or death) only if it is a substantial factor in causing the (injury/or death). A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/or death).

"The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

Instructional error is reviewed under the independent or de novo standard of review. (*People v. Sigala* (2011) 191 Cal.App.4th 695, 698.) The test is whether it is reasonably likely that the jury understood the instructions in a manner that violated the defendant's rights. (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.) The reviewing court must consider the instructions as a whole to determine if error has been committed and interpret instructions to support the judgment if they are reasonably susceptible to such an interpretation. (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.) The

correctness of a jury instruction is determined by considering the entire charge. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

CALCRIM No. 3149 correctly states the law and is not misleading or ambiguous. Defendant maintains that the instructional language that requires the jury to find that "[t]he defendant's act caused (great bodily injury to/or the death of) a person" is misleading and allows the jury to find that "some other act of the defendant" proximately caused the victim's harm. However, viewing the instruction as a whole, it is clear CALCRIM No. 3149 properly requires the jury to find that the firearm discharge proximately caused great bodily injury or death.

CALCRIM No. 3149 provides that the People must prove that "[t]he defendant personally discharged a firearm during the commission of that crime", "intended to discharge the firearm", and that "[t]he defendant's act" caused great bodily injury or death. The first element defined the act, defendant's discharge of a firearm; the third element's reference to "the defendant's act" was a clear reference to the defendant's discharge of the firearm. The subject language "the defendant's act" could only reasonably refer to the defendant's act of discharging the firearm. (See *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1074.)

Furthermore, element three in the instruction states that "the act" must proximately cause great bodily injury or harm. The term "the act" was used to specify the act of discharging a firearm. Viewed in context, using a plain common sense reading, the instruction properly instructed the jury that defendant's discharge of a firearm must

proximately cause great bodily injury or death. Accordingly, CALCRlM No. 3149 is a correct statement of law and defendant's challenge fails.

Finally, even if the instruction was ambiguous, any error was harmless beyond a reasonable doubt. (*People v. Cole* (2004) 33 Cal.4th 1158; *Chapman v. California* (1967) 386 U.S. 18.) Not every ambiguity, inconsistency, or deficiency is a due process violation but the question is whether the instruction """"so infected the entire trial [such] that the resulting conviction violates due process.""""" (*People v. Huggins* (2006) 38 Cal.4th 175, 192; *Middleton v. McNeil* (2004) 541 U.S. 433, 437.)

Here the third element made it clear that the People had to prove that defendant's discharge of the weapon, and not some other act, proximately caused great bodily injury or death. Both defense counsel and the prosecutor argued during closing argument that the jury must consider defendant's act of shooting the gun. The jury had to determine the shooting must have proximately caused the stated harm in order to find the firearm enhancement true. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-528.) Even if the third element did not exactly specify the relevant act had to be defendant's discharge of the weapon, the required element was made clear to the jury in argument and was supported by the physical evidence. The alleged error was harmless under any standard of review.

V

PREMEDITATION AND DELIBERATION

Defendant contends there was insufficient evidence of "planning, motive or mode of killing indicative of a preconceived plan" to prove premeditated and deliberate murder. He argues the court should reduce the judgment to a second degree murder conviction.

We conclude substantial evidence supports the jury's conclusion that the murder was the result of preexisting thought and reflection and not a rash impulse.

We review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Story* (2009) 45 Cal.4th 1282, 1296.) The relevant question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Hatch* (2000) 22 Cal.4th 260, 272; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)

A willful, deliberate, and premeditated killing with malice aforethought is murder in the first degree. (§ 187.) Premeditation and deliberation require more than a showing of intent to kill. (*People v. Booker* (2011) 51 Cal.4th 141, 172.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) "In the context of first degree murder, premeditation means 'considered beforehand' [citation] and deliberation means a "'careful weighing of considerations in forming a course of action."'" (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 10 [Fourth Dist., Div. Two]; quoting *People v. Mayfield* (1997) 14 Cal.4th 668 and *People v. Solomon* (2010) 49 Cal.4th 792.) Premeditation and deliberation do not require an extended period of time; rather, "an opportunity for reflection" (*People v. Cook* (2006) 39

Cal.4th 566, 603) and "can occur in a brief interval." (*People v. Memro* (1995) 11 Cal.4th 786, 863; *People v. Thomas* (1945) 25 Cal.2d 880, 900-901; *Solomon,* at p. 813.)

In assessing the sufficiency of evidence of premeditation and deliberation, courts have generally used the factors articulated in *People v. Anderson* (1968) 70 Cal.2d 15, including the nature of the killing, the defendant's relationship or conduct with the victim related to motive, and what the defendant did before the actual killing which could be characterized as "planning activity." (*Id.* at pp. 26-27; *People v. Stitely, supra*, 35 Cal.4th at p. 543.) The *Anderson* factors—motive, planning, and manner of killing—are not elements of premeditation and deliberation, and "are not prerequisites for proving premeditation and deliberation." (*People v. Shamblin, supra*, 236 Cal.App.4th at pp. 10-11, fn. 16, citing *People v. Sanchez* (1995) 12 Cal.4th 1, 32-33.)

In *Shamblin*, this court determined there was sufficient evidence of premeditation and deliberation in a case where the defendant entered a woman's house and strangled her to death. (*People v. Shamblin, supra*, 236 Cal.App.4th at pp. 6, 11.) *Shamblin* reasoned that the manner of killing by strangling was substantial evidence of premeditation and deliberation because "its prolonged nature provides ample time for the killer to consider his actions." (*Ibid*.) Because the defendant's attack lasted one to five minutes and the defendant applied significant force in order to break the victim's neck, "the defendant had ample time to consider the consequences of his actions as he was attacking the victim." (*Id*. at pp. 11-12.)

Here the evidence showed that defendant shot and beat the victim to death. The forensic pathologist testified there were significant trauma and fractures on the skull. The

mandible, a very strong bone, was broken in half. Multiple bullets and bullet shell casings at the scene supported the reasonable inference that defendant shot the victim multiple times and at close range. The jury could have reasonably determined that defendant did not act impulsively when he shot the victim, fractured her skull, and broke her jaw in half. Defendant certainly had the opportunity to reflect and consider the consequences of his action. His prolonged attack was not a killing that happened instantly or in the heat of the moment and constituted substantial evidence supporting the jury's finding of premeditation and deliberation. (*People v. Wattie* (1967) 253 Cal.App.2d 403, 409 [persistence is sufficient evidence of premeditation and deliberation]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1293 [sufficient evidence of premeditation and deliberation where defendant strangled and then slashed the victim's throat because "even if the initial strangulation was spontaneous, the additional act of slashing her throat 'is indicative of a reasoned decision to kill'"].)

Other evidence of premeditation were the accounts of past conflict between defendant and the victim, in which defendant threatened her with a gun. (*People v. Stitely*, *supra*, 35 Cal.4th 514 at p. 543.) There was also evidence defendant may have been motivated to kill the victim because she was pregnant. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1238.) Defendant told his neighbor he had kicked Elliott out of his home, and he called her a "bitch." His anger towards her also established evidence of motive. (*People v. Cruz* (1980) 26 Cal.3d 233, 245; *People v. Jackson* (1989) 49 Cal.3d 1170, 1200.) Viewing the evidence in the light most favorable to the judgment,

substantial evidence allowed the jury reasonably to conclude defendant was guilty of first degree murder.

VI

EXCLUSION OF VICTIM'S STATEMENT

Defendant argues that the trial court erred in disallowing evidence that Elliott had told Krueger that two people who were friends with defendant, Sylvester and Angie, might hurt her. Defendant contends he was deprived his due process right to present evidence crucial to his defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Because the evidence was hearsay and not central to defendant's defense, its exclusion was proper and did not deny defendant his constitutional right to present a defense.

On cross-examination, Krueger testified that Elliott had expressed concern about Sylvester and Angie's influence on defendant. When defense counsel asked Krueger about Elliott's statement, the prosecutor objected on hearsay grounds. The trial court sustained the objection. Defense counsel argued that the statement was admissible because it was relevant to show the victim's fear and state of mind. The court ruled that evidence of her state of mind or fear was admissible but testimony that she named two specific people who she believed might be responsible if something were to happen to her was inadmissible as hearsay.

At trial, defendant argued that the evidence was admissible to show the victim's state of mind. He did not argue that the evidence was admissible because it was crucial to his defense or that it was admissible to prove third-party culpability, as he argues now. He also did not argue his due process rights to present a defense and his Fifth and Sixth

Amendment rights were violated. Because defendant did not argue at trial the grounds he asserts on appeal, his claim of constitutional error is forfeited. (*People v. Ervine* (2009) 47 Cal.4th 745, 783.)

Notwithstanding the issue of forfeiture, defendant's claims fail on the merits. We review the trial court's exclusion of hearsay evidence for an abuse of discretion that is arbitrary, capricious, or patently absurd manner and resulted in a manifest miscarriage of justice. (*People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Foster* (2010) 50 Cal.4th 1301, 1328.) The application of state rules of evidence does not generally infringe on a defendant's constitutional right to present a defense. (*People v. Thornton* (2007) 41 Cal.4th 391, 443; *People v. Boyette* (2002) 29 Cal.4th 381, 428.)

In *People v. Hall* (1986) 41 Cal.3d 826, 833, the California Supreme Court held that, for third-party evidence to be admissible, the proffered evidence must "be capable of raising a reasonable doubt of defendant's guilt." The evidence does not need to show "'substantial proof of probability'" that another person committed the crime but there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

In *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1134-1138, the California Supreme Court considered whether a trial court erred in excluding evidence proffered to show that a third party murdered the victim. At trial, the defendant sought to present evidence that the victim was involved in drug trafficking and that the day before she was murdered she had asked defendant to accompany her to protect her in a meeting with a drug dealer. (*Id.*

at p. 1135.) The Supreme Court found that there was no direct or circumstantial evidence to link any third party with the victim's death. (*Id*. at p. 1137.)

The statement about Sylvester and Angie did not directly or circumstantially link the two parties to the murder or raise a reasonable doubt about defendant's guilt. (*People v. DePriest* (2007) 42 Cal.4th 1, 43; *People v. Hall, supra*, 41 Cal.3d at p. 833.) The evidence against defendant was substantial: his house was awash in the victim's blood; her blood was found inside the gun barrel; when the neighbor saw defendant barefoot and pantless, defendant told the neighbor that Elliott was "fucking dead . . . in the kitchen"; and defendant's DNA was at the gravesite. Before the murder, defendant had threatened Elliott with a gun. The evidence conclusively established defendant's guilt in spite of any comments Elliott made about his friends. Any error was harmless beyond a reasonable doubt. (*People v. Hall, supra*, 41 Cal.3d at p. 836.)

VII

PROSECUTOR'S CONDUCT

During closing argument, the prosecutor referred to defendant as a "beast" five times. Defendant contends the prosecutor's comments constituted prejudicial misconduct, an "improper attempt to inflame the jury against him," and violated his constitutional rights.

A prosecutor violates the federal constitution if the prosecutor engages in """a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.'""" (*People v. Gray* (2005) 37 Cal.4th 168, 215, quoting *People v. Gionis* (1995) 9 Cal.4th 1196; *People v. Zambrano* (2004) 124

Cal.App.4th 228, 241 [Fourth Dist., Div. Two].) A prosecutor's conduct violates state law where the defendant's trial is rendered fundamentally unfair due to the prosecutor's use of "'"deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

Defendant again has forfeited his claim on appeal by not objecting at trial below. (*People v. Collins* (2010) 49 Cal.4th 175, 226.) We disagree that defendant's failure to object should be excused as a futile gesture. (*People v. Clark* (2011) 52 Cal.4th 856, 960.) Had defendant objected, it would likely have discouraged the prosecutor's subsequent use of the term "beast." (*People v. Dennis* (1998) 17 Cal.4th 468, 521.) Furthermore, there may have been a strategic reason not to object. (*People v. Freeman* (1994) 8 Cal.4th 450, 495.) Defendant's claim of ineffective assistance of counsel must be brought by writ of habeas corpus. (*Dennis*, at pp. 521-522.)

In any event, a prosecutor is permitted considerable latitude to "use appropriate epithets" during argument. (*People v. Williams* (1997) 16 Cal.4th 153, 221; *People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) In view of the evidence depicting a horrendous crime, the prosecutor did not exceed the permissible scope of vigorous closing argument. (*People v. Farnam* (2002) 28 Cal.4th 107, 199-200 [prosecutor's reference to the defendant as a "beast," "monster," and "garbage"]; *People v. Edwards* (2013) 57 Cal.4th 658, 765 [defendant convicted of first degree murder as "monster" and "animal"]; *People v. Sully* (1991) 53 Cal.3d 1195, 1249 [reference to the defendant as a "human monster" and a "mutation" was not misconduct]; *People v. Terry* (1962) 57

Cal.2d 538, 561-562 [references to the defendant as an "animal" and as "vicious" permissible argument].)

The prosecutor's conduct was not equivalent to the conduct in *People v. Fosselman* (1983) 33 Cal.3d 572, 580, and *People v. Herring* (1993) 20 Cal.App.4th 1066. Unlike in those cases, the remarks in this case were made in passing and confined to closing argument. (*People v. Smithey* (1999) 20 Cal.4th 936, 961.) Finally, any error was harmless. (*People v. Brown* (2003) 31 Cal.4th 518, 554.) It was not reasonably probable that a more favorable result would have been reached had the prosecutor refrained from making the remarks. (*People v. Milner* (1988) 45 Cal.3d 227, 245.) As such, the prosecutor's conduct did not violate defendant's federal or state constitutional rights under any standard of review.

VIII

PROPENSITY EVIDENCE

Defendant next contends the trial court's ruling admitting the prior uncharged act of domestic violence by defendant as propensity evidence under Evidence Code section 1109 violated his constitutional rights to equal protection and due process. Defendant concedes the California Supreme Court has rejected this argument in *People v. Falsetta* (1999) 21 Cal.4th 903, 912-922, followed by *People v. Brown* (2011) 192 Cal.App.4th 1222, 1233, footnote 14, *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704, and many other appellate cases. Evidence Code section 1109 is constitutional.

In a related claim, defendant contends that the trial court violated his right to due process when it instructed the jury based on CALCRIM No. 852 because it interferes

with the presumption of innocence and allows the jury to make a finding based on a standard of proof less than beyond a reasonable doubt. Again defendant forfeited his claim on appeal. (*People v. Valdez* (2004) 32 Cal.4th 73, 137.) On the merits, the claim has been rejected by the California Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007. Defendant acknowledges that this court is bound by the ruling in *Reliford* but raises the issue to preserve it for federal review.

IX

CALCRIM NOS. 362 AND 371

Defendant's challenge to CALCRIM Nos. 362 and 371, the "consciousness of guilt" instructions, is also forfeited (*People v. Valdez, supra*, 32 Cal.4th at p. 137) and has been rejected by the California Supreme Court. (*People v. Howard* (2008) 42 Cal.4th 1000, 1024; *People v. Morgan* (2007) 42 Cal.4th 593, 621; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224.) Defendant argues that these cases are distinguishable because they used the words "consciousness of guilt," whereas CALCRIM Nos. 362 and 371 use the words "aware of his guilt." This argument has also been rejected. (*People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1157-1159.)

Furthermore, any error was harmless. The jurors were instructed that they had to consider "all the evidence" (CALCRIM No. 220) and the evidence had to leave them "with an abiding conviction that the charge is true." (CALCRIM No. 103.) If they could draw two or more reasonable conclusions from the circumstantial evidence, one pointing to innocence and one to guilt, they had to accept the one pointing to innocence. (CALCRIM No. 224.) In light of all the instructions, there is no reasonable likelihood

that the jury would have interpreted the instructions as defendant suggests. There is no possibility of prejudice as a result of either instruction.

X

EFFECTIVE REPRESENTATION

Because defendant cannot show prejudice, his claims of ineffective assistance of counsel are rejected. To establish a claim of ineffective assistance of counsel, a defendant must show that 1) counsel's performance was deficient under an objective standard of professional reasonableness, and 2) the defendant was prejudiced. (*Strickland v. Washington* (1984) 466 U.S. 668; *In re Jones* (1996) 13 Cal.4th 552, 561.) To establish prejudice, defendant must show there was a reasonable probability that the result would have been more favorable but for the deficient performance. (*Strickland,* at p. 687.)

Claims that trial counsel was ineffective for failing to object should be rejected on appeal "if the record does not affirmatively show why counsel failed to object and the circumstances suggest counsel could have had a valid tactical reason for not objecting." (*People v. Jones* (2009) 178 Cal.App.4th 853, 860 [Fourth Dist., Div. Two]; *People v. Mendoza Tello* (1997) 15 Cal.4th 264.) If trial counsel had a tactical purpose, his representation was not deficient. (*People v. Freeman, supra,* 8 Cal.4th at p. 495.) Defendant's claims must be brought on habeas. (*People v. Dennis, supra,* 17 Cal.4th at pp. 521-522.)

We have rejected defendant's other arguments. Therefore, defendant cannot make the necessary showing that he received constitutionally ineffective assistance as the result of defense counsel's purported lapses.

XI

DISPOSITION

Defendant's many arguments lack merit or are the subject of well-settled law. However, based on the dates of his arrest and sentencing, defendant is entitled to 742, not 741, days of presentence custody credit. We affirm the judgment but ordered it modified to state 742 days of custody credit. We direct the trial court to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.